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No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

JOHN LESTER HARRIS,
RICHARD WARREN and
DENNIS WARREN, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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No. 82-_____

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UNITED STATES OF AMERICA, Respondent.

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The petitioners, John Lester Harris, Richard Warren, and Dennis Warren, pray that a writ of certiorari issue to reveiw the judgment of the Court of Appeals for the Fourth Circuit affirming their con-

victions for conspiracy to violate the civil rights of citizens, for holding persons in involuntary servitude, and for kidnapping a person with the intent to hold him as a slave.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying this Court's earlier decisions in cases that alleged ineffective assistance of counsel because of defense counsel's conflict of interest:

   (a) by requiring the defendants to prove an actual conflict of interest, where the trial court failed to investigate the matter despite a pre-trial motion raising the issue?

   (b) by finding there was no actual conflict of interest where defense counsel represented an employee and an employer who had jointly participated in activities out of which the criminal charges arose; when the employee alone was prosecuted; when the employer was called as a prosecution witness; and when the employer was identified to the jury by defense counsel as his chief witness but never called?

2. Is the failure of a crew leader and his assistant to forsee the death of

a farm worker as a result of heat stroke or alcohol withdrawal sufficient to invoke the harsher sentences, such as life imprisonment, permitted under 18 U.S.C. §241 in cases where death results?

3. Can a crew hand be convicted of aiding and abetting the crew leader in ordering a farm worker back to camp simply upon evidence that the farm worker knew the crew hand had earlier beaten other farm workers and guarded farm workers?

4. Did the Court of Appeals err in reinstating the conviction of one of the co-defendants on grounds that it was a permissible example of jury leniency, where the jury found two of three co-defendants guilty of an alleged conspiracy which resulted in death, but found the third co-defendant guilty of the same conspiracy which did not result in death?

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guarded farm workers is in conflict with earlier decisions of this Court.

4. The Court of Appeals' action in reinstating the conviction of one co-defendant who the jury convicted of conspiracy not resulting in death while convicting his two co-defendants of the same conspiracy resulting in death is in conflict with prior decisions of this Court. 27

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OPINIONS BELOW

The opinion of the Fourth Circuit rendered on March 1, 1983, is published, F.2d. (4th Cir. 1983). It is reprinted as Appendix A to this Petition. (pp. 32-59).

The opinion of the United States District Court which granted Richard Warren a judgment of acquittal was published as United States v. Warren, 535 F.Supp. 1102 (E.D.N.C. 1982). It is reprinted as Appendix B to this Petition. (pp. 60-76).

JURISDICTION

Jurisdiction of the appeal to the Court of Appeals for the Fourth Circuit was based upon 28 U.S.C. §1291.

Jurisdiction for this Petition is based upon 28 U.S.C. §1254(1).

The Court of Appeals judgment was rendered March 1, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have cumpulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §241:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. §1584:

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. Legal Proceedings.

John Harris, Dennis Warren, and Richard Warren were indicted on federal charges arising out of management of a crew of migrant farm workers in North Carolina. A jury convicted John Harris and Dennis Warren of conspiracy to violate the rights of certain laborers to be free from slavery, resulting in death to one laborer, in violation of 18 U.S.C. §241. Richard Warren, although indicted in the same conspiracy count with Harris and Dennis Warren, was convicted only of the lesser offense of conspiracy without death resulting in violation of 18 U.S.C. §241. All three were convicted of holding Harvey Rutherford in involuntary servitude in volation of 18 U.S.C. §§ 2 and

1584. Harris and Dennis Warren were also convicted of holding laborer Craig Connors to involuntary servitude. Harris was also convicted of kidnapping Joseph Simes with the intent to hold him as a slave, in violation of 18 U.S.C. §1583.

After conviction, the district court granted Richard Warren's judgment of acquittal on the conspiracy count, ruling that his conviction for a conspiracy not resulting in death was inconsistent with the jury's finding that the conspiracy of Harris and Dennis Warren had resulted in death.

Defendants appealed their convictions and the government cross-appealed from the judgment of acquittal entered on Richard Warren's conspiracy count. The Court of Appeals for the Fourth Circuit affirmed all substantive convictions, but reversed Richard Warren's judgment of acquittal on the conspiracy count.

B. Facts Established at Trial.

The prosecution stemmed from the management of a crew of migrant farm workers who lived and worked on a farm owned by Cecil Williams and Cecil Williams, Jr. in Nash County, North Carolina, during the summer of 1981. Cecil Williams employed petitioner

Dennis Warren to provide and supervise a crew of migrant laborers to harvest Williams's crops. Dennis Warren was assisted in running the crew by his brother, Petitioner Richard Warren, and Petitioner John Harris.

On September 13, 1981, Robert Anderson, a migrant farm worker, died on Dennis Warren's bus to which he had been taken after collapsing. Two autopsies established that heat stroke was the most probable cause of death, with alcohol withdrawal being a less likely cause. An ensuing investigation culminated in charges that Dennis Warren, Richard Warren, John Harris and others had, in the course of the operation of the migrant farm camp, conspired to deprive U.S. citizens of their civil rights, which conspiracy had resulted in the death of Robert Anderson.

Various substantive offenses, not involving Robert Anderson's death, were also brought against the Petitioners for actions allegedly taken against other farm workers. In one of these, Dennis Warren and John Harris were charged with holding Craig Connors to involuntary servitude in violation of 18 U.S.C. §1584. Connors testified at trial that he had come to the camp voluntarily. When he attempted to leave the camp on foot, he encountered Dennis Warren on the road, who ordered him at gunpoint to return to camp. Connors testified neither John

Harris nor Richard Warren had been involved in this episode. The jury, however, found both John Harris and Dennis Warren guilty of this offense.

Other facts will be described in the context of the contentions to which they relate.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision in excusing the trial court's failure to investigate defense counsel's conflict of interest and in finding no conflict of interest conflicts with prior decisions of this Court.

The Court of Appeals, by denying the Warrens' Sixth Amendment claim that their defense attorney had a potential conflict of interest, which was objected to at trial, but not investigated, decided the Warrens' claim in conflict with the applicable law set out in Cuyler v. Sullivan, 446 U.S. 335 (1980) and other decisions of this Court.

The background facts relating to the conflict are these. At the time of trial, Dennis Warren, a nineteen year old, black, illiterate migrant worker, and his brother Richard Warren, in his early twenties, were charged with enslaving some migrant workers on the farm of their employers, Cecil Williams, Sr. and Cecil Williams, Jr. It was revealed at trial that the employers, the Williamses, were also in the fields with the harvesting crews, and on one occasion, Mr. Williams, Sr. made a threatening remark about the use of violence. The farm owners were white.

The law firm of Mast, Tew & Armstrong regularly represented the farm owners, but undertook to represent the two Warrens in the criminal prosecution. Mr. Williams, Sr. had been notified he was a likely prosecution witness. Certainly Mr. Williams, Sr. was one of the best witnesses to the activities of the harvesting crew.

Two months prior to trial, the government requested the Court to inquire into the possible conflict of interest in Mast, Tew & Armstrong representing both the employees (the Warrens) and their employers (the Williamses). The prosecution sought in their motion to obtain an inquiry and possibly a waiver by defendants in reliance on the United States v. Garcia, 517 F.2d. 272 (5th Cir. 1975).

This notice to the Court triggered an affirmative duty on the part of the Court and of defense counsel to inquire into the potential conflict of interest, and to extract a knowing and intelligent waiver or response from the Warrens at the hearing. Although a pre-trial hearing before a United States Magistrate was held, an inquiry into these matters was not made. In an agreed statement of facts made a part of the appellate record, the Magistrate stated that "there was no separate inquiry into any conflict of interest presented by Mr. Armstrong's and Mr. Mast's representation of Cecil Williams, Sr. and Cecil Williams, Jr., the employers of the defendants

Warren." The Warrens' defense attorney at the time also stated in the agreed statement of facts that he did not remember whether that conflict of interest was ever mentioned at the hearing.

The Court of Appeals, although acknowledging these facts in its decision, based its denial of the Warrens' request for a new trial because of ineffective assistance of counsel, on the decision in Cuyler v. Sullivan. Specifically, the Court stated what it considered to be the applicable test from Cuyler: "in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

In utilizing this test, the Court of Appeals applied the wrong rule. In the Warrens' case, a timely objection was made. Once a timely objection is made, the correct test is whether a proper inquiry has been conducted to determine whether the risk of conflict was too remote to deprive the Warrens of the guarantee of effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas. 435 U.S. 475, 483-484 (1978); Glasser v. United States, 315 U.S. 60 (1942). In Holloway v. Arkansas, supra, the Court specifically refused to require, once a possible conflict of interest had been raised, that the conflict of

interest prejudice the defendant in some specific fashion as a test not susceptible of intelligent, evenhanded application. This Court, in Cuyler v. Sullivan, supra, in applying a stricter rule, observed that " no participant in Sullivan's trial ever objected." In the Warrens' case, a participant, the prosecution, clearly raised the objection by motion. The Petitioners argue that it makes no difference which participant raises the timely objection. Once the timely objection is raised, the Court has an affirmative duty to inquire into it, and failure to do so deprived the Petitioners of their Sixth Amendment right to make a knowing and intelligent choice after inquiry whether they wanted a new lawyer or not. Glasser v. United States, 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978).

The Fourth Circuit adopted a rule that, despite a clear pre-trial objection and despite failure of the defense attorney and the magistrate in their duties, the Warrens' claim must be weighed by the stricter test; this rule required the Petitioners to prove actual conflict of interest which adversely affected their defense attorney's performance. This is precisely the rule that, in Holloway, the Court found not to be susceptible of evenhanded application, since it was impossible in retrospect to "assess the impact of a conflict of interests on the attorney's opinions, tactics, and decisions." Holloway v. Arkansas, supra.

There can be no question that the Warrens fell into a class of defendant that was particularly in need of clear advice on this potential conflict. The defense attorneys represented two trial participants: the white farmers/employers, who were people of property; and two young, black migrant workers, who were less educated, whose financial position was less secure, and who were outsiders in the southern community where the criminal activities arose. These defendants were in desperate need of the clear advice of the Court set out in United States v. Garcia and mandated by the Supreme Court as early as Glasser v. United States. The decision of the Court of Appeals materially waters down the protections that should be afforded in such cases.

Even assuming the Fourth Circuit correctly applied the stricter rule to this case, it applied the rule contrary to the guidance provided by this Court in Wood v. Georgia, 450 U.S. 261 (1981). In Wood, the Court found that when a defense attorney represents the employer and employee who jointly participated in activities out of which criminal liability arose, this is inherently a dangerous conflict of interest. Citing In re Abrams, 56 N.J. 271, 276, 266 A.2d. 275, 278 (1970), the Court quoted that court's decision with approval: "A conflict inheres in every such situation... it is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public

interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." This rule was indeed an expression of an attorney's ethical duties. See ABA Code of Professional Responsibility, DR 5-107 (A), (B), and ABA Standards for Criminal Justice 4, 3.5(c).

In Wood, the Court states this inherent conflict was so dangerous and clear that, even though no timely objection was made, the "clear possibility" of this conflict on the record was sufficient for the Court to raise the issue on its own and to reverse the judgment.

In the present case, the Court of Appeals found no actual, prejudicial conflict of interest existed between the Petitioners and their employers. The Court's finding was made (1) even though the Warrens' defense counsel also regularly represented the Warrens' employers who had jointly participated in the activities out of which the criminal charges arose, (2) even though the employer was called as a prosecution witness, and (3) even though defense counsel promised the jury in his opening statement that he would call the employer as a major witness and did not. Defense Counsel's

inherent conflicts of interest blossomed during the course of the trial when the prosecutors told the Court and defense counsel that the government had a witness who would testify that the employer, Cecil Williams, Sr., had told one of the Petitioners to use force to get his crops picked. Thereafter, when the government called Mr. Williams, Sr. as a witness, defense counsel on cross-examination solicited a statement from Mr. Williams, Sr. that allowed the employer to put distance between himself and the harvesting crew. Although defense counsel promised the jury at the trial's outset that it would call Mr. Williams, Sr., the defense rested its case without doing so.

This inherent conflict of interest was real and denied the petitioners effective assistance of counsel in violation of their Sixth Amendment rights. The Court of Appeals decision, in failing to find an actual, prejudicial conflict of interest on these facts greatly reduces the Sixth Amendment protection provided by this Court in its decision in Wood v. Georgia, supra.

2. The Court of Appeals decision is in conflict with decisions in the Second and Fifth Circuits by imposing the harsher penalties provided by 18 U.S.C. §241 for cases resulting in death for conduct which did not involve a forseeable risk of serious bodily injury or death.

The Court of Appeals decision permits the imposition of life imprisonment under 18 U.S.C. §241 for conduct not warranting increased punishment under the "resulting in death" element of 18 U.S.C. §241. Both Dennis Warren and John Harris were convicted of participating in a conspiracy that resulted in the death of Robert Anderson, in violation of 18 U.S.C. §241. This section provides:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or Laws of the United States, or because of his having so exercised the same,
>
> ...
>
> they shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

John Harris's life sentence and Dennis Warren's 20-year sentence are both well in excess of the maximum punishment provided by §241 for a conspiracy not resulting in death.

The decision of the Fourth Circuit below was one of first impression in that Circuit on what is required

for the sentence-enhancing, "resulting in death" element of §241 to apply. While acknowledging decisions in two other circuits that have addressed this question, the Court of Appeals permitted the District Court to impose sentences on John Harris and Dennis Warren for conduct which did not rise to the conduct required by the decisions in the other Circuits. In the first reported appellate case involving the issue, United States v. Guillette, 547 F.2d. 743 (2d. Cir. 1976), the defendants were convicted of violating §241 by conspiring to cause the death of a federal witness. The federal witness died in that case as a result of an explosion which he himself triggered by opening a booby-trapped door. The defendants in that case contended that they could not be held liable because the witness himself triggered the booby trap. The Second Circuit, in rejecting this argument, held that the increased punishment was not limited to cases where the defendant's acts directly caused the death, but also explained that:

> "The more severe punishment prescribed for those conspiracies resulting in death was designed to deter the type of conduct that creates a risk of loss of life or serious bodily injury."

547 F.2d. at 749.

In the second case, United States v. Hayes, 589 F.2d. 811 (5th Cir. 1979),

the Fifth Circuit construed the resulting in death element of 18 U.S.C. §242, the criminal statute which punishes deprivation of federal rights under color of law.* Hayes involved a situation where a police chief had been convicted of violating §242 after an illegally arrested prisoner was killed. After arresting the prisoner, the police chief took him to a dark, secluded road, where he proceeded to terrorize the handcuffed prisoner and beat him with a double-barreled shotgun. The police chief contended he was not guilty of violating §242 "resulting in death" because the prisoner died when the shotgun discharged accidentally in the course of the beating. While rejecting the argument that a willful intent to cause death was required, the Fifth Circuit stated:

> " [C] an it be seriously argued that a police officer who illegally arrests a person who, on the way to the paddy wagon, is killed by a bolt of lightning, has committed the type of offense which the amendment to §242 was designed to deter? We think not. Rather, the more serious punishment prescribed for those §242 violations resulting in death is clearly designed to deter

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*In 1968, Congress added language to §242 increasing the possible punishment in death cases to life imprisonment by the same law that increased the punishment possible under §241.

> the type of conduct that creates an unacceptable risk of loss of life. Risk of death resulting from being struck in the stomach with the breech, butt, and then the barrel of a loaded double-barreled .12 gauge shotgun is precisely such an unacceptable risk. Loaded guns are designed to injure and kill."

589 F.2d. at 821.

In conflict with the decisions in Hayes and Guillette, the Fourth Circuit permitted the maximum punishment under §241 to be imposed in a case which did not involve conduct rising to that which was condemned in Hayes and Guillette. The government's evidence showed that the farm worker, Robert Anderson, arrived at the camp several days prior to his death. When he arrived at the camp, he was ill, and became more ill in the days prior to his death. The government's evidence further indicated that the Petitioners, as they did with other farm workers at the camp, prodded Robert Anderson into working and did not heed Anderson's statements or the statements of other workers that they did not want to work. Following Anderson's collapse, the Petitioners called for medical assistance, but Anderson was pronounced dead when it arrived. Autopsies by two pathologists who testified at trial, indicated that the deceased had not been subjected to any beatings, and that his death had resulted most probably from heat stroke,

but with some possibility that death was caused by alcohol withdrawal. While the death of Robert Anderson was unfortunate, the defendants' conduct did not inovlve the type of conduct that poses the risk of serious bodily injury or death that was required in the Guillette and Hayes decisions.

In this regard, the Court of Appeals decision conflicts with the decisions of the Second and Fifth Circuits. Punishing John Harris with life imprisonment and Dennis Warren with twenty years' imprisonment does not serve the section's purpose in deterring conduct that carries with it a forseeable and unacceptable risk of serious bodily injury or death. Because of the conflict that exists between these decisions and because this Court has never reviewed the question presented in this case, a writ of certiorari should issue to review this question.

3. The Court of Appeals' decision in affirming John Harris' conviction for aiding and abetting Dennis Warren in holding Craig Connors to involuntary servitude conflicts with prior decisions of this Court.

In one of the substantive counts in this case, the Government charged both John Harris and Dennis Warren with violating 18 U.S.C. §§2 and 1584, by forcing a farm worker, Craig Connors, to stay at

the labor camp. The evidence presented at trial was that Connors had voluntarily come to the labor camp on two occasions. On the second occasion, he became unhappy with working conditions and decided to leave the camp on foot. While walking along the road from the camp, he met Dennis Warren, who threatened to shoot him if he did not return to camp in Warren's car. Connors returned to camp. No evidence at trial indicated that John Harris had had direct contact with Connors on that occasion, or had ever made any threats to Connors about leaving the camp. Nor was there evidence on the record that John Harris indirectly assisted Dennis Warren during the episode where Warren allegedly threatened Connors with physical violence if he did not return to camp.

Despite this, the Court of Appeals held that Craig Connors' testimony that he had earlier seen John Harris beat other farm workers for not working and had earlier guarded other farm workers was sufficient to convict Harris of aiding and abetting Dennis Warren on this occasion.

The Court of Appeals decision, in this regard, departs from the long-settled rule lain down by this Court to govern convictions for aiding and abetting. For example in Nye & Nissan v. United States, 336 U.S. 613 (1949), the Court stated:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" [Citation omitted.]

336 U.S. at 619.

Because of the conflict between the Court of Appeals decision and the long-standing rule set down by this Court, a writ of certiorari should issue to review this question.

4. The Court of Appeals' action in reinstating Richard Warren's conviction conflicts with prior decisions of this Court and decisions in other Circuits.

When the Court of Appeals granted the government's appeal and overturned the District Court's judgment of acquittal of Richard Warren on the conspiracy count, the Court acted in conflict with the applicable law set out in Dunn v. United States, 284 U.S. 390, 393 (1932) and the cases following it. In its opinion, the Court of Appeals misstated the rule in Dunn as follows: "the rationale from Dunn is that inconsistent verdicts may stand if they could have been separately charged and tried." In doing

so, the Court dismissed conflicting decisions from other Circuits: Marquez-Anaya v. United States, 319 F.2d. 610 (5th Cir. 1963) and Fuller v. United States, 407 F.2d. 1199, 1225 (D.C. Cir. 1968). The Court also totally ignored another conflicting case from the Third Circuit, United States v. Hannah, 584 F.2d. 27 (3d Cir. 1978).

The rule of Dunn was correctly applied in Marquez, Fuller, and Hannah; if properly applied here, it would compel the Court to uphold the judgment of acquittal granted by the trial judge to Richard Warren.

The Dunn case holds that when a jury brings in inconsistent verdicts, the inconsistent verdicts can be upheld and excused as jury lenity, under the following circumstances: if it would be possible to try the underlying crimes behind the inconsistent verdicts as two separate indictments, and an acquittal on one could not be pleaded as res judicata of the other. The Court of Appeals truncated the Dunn rule to mean that if the crimes underlying the inconsistent verdicts could be tried separately, regardless of any res judicata or collateral estoppel effect, then jury lenity can be used to excuse the inconsistency. By ruling that the charges on which the jury returned inconsistent verdicts could have been tried as two separate indictments, the Court excused these inconsistent verdicts as jury lenity.

Other Circuits have correctly applied the Dunn case and overturned inconsistent verdicts which were based upon contradictory findings of fact which, if separated into two indictments and tried separately, would have resulted in an acquittal of one being pleaded as res judicata of the other. In fact, the rule set out in the present case cannot explain those cases. In United States v. Hannah, 584 F.2d. 27, 30 (3rd Cir. 1978), the Court found that where convictions arising out of several counts were predicated by the government on one conspiracy, where the jury acquitted on the conspiracy, the other felony count which relied on the finding of that conspiracy could not stand. An n.o.v. was granted and affirmed on appeal. In addition, in Marquez-Anaya v. United States, 319 F. 2d. 610 (5th Cir. 1963), the Court held that a criminal conviction in one count could not be sustained since it relied on a factual finding completely in conflict with a finding of fact in another count. The Fifth Circuit was again merely applying the correct Dunn rule, that if the charges underlying inconsistent verdicts were separated, and an acquittal of one would be res judicata of the other, then jury lenity will not excuse those inconsistent verdicts. Also, see Fuller v. United States, 407 F.2d. 1199, 1223-25 (D.C. Cir. 1968)(en banc), cert. denied, 393 U.S. 1120 (1969).

In support of its decision, the Fourth Circuit cited this Court's recent decision in Standefer v. United States,

447 U.S. 10, 21-25 (1980). That case involved whether non-mutual collateral estoppel could be applied against the government from one criminal case to another involving different defendants. But in the immediate case, the Warrens and Harris were charged in one count with one conspiracy and tried in one trial. It would not have been possible to try the criminal charges underlying the inconsistent verdicts separately, without an acquittal on one acting as res judicata of the other. The trial judge recognized this in his opinion when he concluded that the "verdicts demonstrate there was no legal basis for the jury's decision". In doing so, the District Judge relied on United States v. Uzzolino, 651 F.2d. 207, 213 (3rd Cir. 1981), yet another Circuit opinion at odds with the Court of Appeals decision below.

Because of the conflict of the decision below with decisions from other Circuits and the uncertainty the decision creates in the application of the rule lain down by this Court in Dunn, a writ of certiorari should issue to review this question.

CONCLUSION

Petitioners, for the reasons set forth above, respectfully petition this honorable Court for the granting of a Writ of Certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5049

United States of America,

Appellee,

v.

John Lester Harris,

Appellant.

No. 82-5052

United States of America,

Appellee,

v.

Dennis Warren,

Appellant.

No. 82-5157

United States of America,

Appellee,

v.

Richard Warren,

Appellant.

No. 82-5181

United States of America,

Appellant,

v.

Richard Warren,

Appellee.

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilson. W. Earl Britt, District Judge.

Argued January 14, 1983

Decided March 1, 1983

Before WINTER, Chief Judge, WIDENER, Circuit Judge, and FIELD, Senior Circuit Judge.

Michael W. Patrick for Appellant John Lester Harris; Edwin R. Ivy, Jr. for Appellants Richard Warren and Dennis Warren; Mildred M. Matesich, Dept. of Justice (Samuel T. Currin, United States Attorney; Wm. Bradford Reynolds, Assistant Attorney General; Walter W. Barnett, Dept. of Justice on brief) for Appellee.

WINTER, Chief Judge:

In the prosecution of John Harris, Dennis Warren, and Richard Warren on various federal charges arising out of their management of a migrant labor farm in Wilson, North Carolina, the jury convicted Harris and Dennis Warren of conspiracy to violate the rights of certain laborers to be free from slavery, resulting in the death of one laborer, in violation of 18 U.S.C. §241[1]. Richard Warren, however, although indicted in the same conspiracy count with Harris and Dennis Warren, was convicted only of the lesser included offense of conspiracy without death resulting, also a violation of 18 U.S.C. §241. All three were convicted of holding laborer Harvey Rutherford to involuntary servi-

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[1] 18 U.S.C. §241 provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States... [t] hey shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

tude in violation of 18 U.S.C. §§2 and 1584.[2] Harris and Dennis Warren were also convicted of holding laborer Craig Connors to inovluntary servitude.[3]

After sentence was imposed on Richard Warren, the District Court granted his motion for a judgment of acquittal on the conspiracy count, ruling that his conviction for a conspiracy not resulting in death was impermissibly inconsistent with the jury's finding, as to Harris and Dennis Warren, that the conspiracy had resulted in death.

With the exceptions noted below, defendants have appealed their convictions,[4] and the government has cross-appealed from the judgment of acquittal entered on Richard Warren's conspiracy count. We

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[2] 18 U.S.C. §1584 provides:

Whoever knowingly and wilfully holds to involuntary servitude...any other person for any term...shall be fined not more than $5,000 or imprisoned not more than five years, or both. (continued) (sic).

[3] Id. §§2 and 1584. Harris was also convicted of kidnapping laborer Joseph Simes with intent to hold him as a slave, in violation of 18 U.S.C. §1583.

[4] Harris does not appeal from his conviction for kidnapping Joseph Simes or holding Harvey Rutherford to involuntary servitude. Dennis Warren does not appeal (continued)

affirm all of the substantive convictions, but we reverse Richard Warren's judgment of acquittal on the conspiracy count and reinstate the judgment of conviction and sentence imposed thereon. We see no merit in defendant's contentions that they were denied the effective assistance of counsel.

I.

Introduction

The prosecutions stemmed from the management of a crew of migrant farm workers who lived and worked on the farm of Cecil Williams and Cecil Williams, Jr., in Nash County, North Carolina, during the summer of 1981. Cecil Williams employed Dennis Warren to provide and supervise a crew of migrant laborers to harvest Williams' crops, including cucumbers, sweet potatoes and tobacco. The crops were harvested by hand. For the season May to October, Williams paid Dennis the sum of $72,000, out of which Warren paid the expenses of the harvesting operation. Dennis was assisted in running the crew by his brother Richard Warren, John Harris, and a certain Halsey Norwood.

The government's evidence showed that many of the workers for Dennis Warren's camp were recruited by methods ranging from deception to kidnapping. In the camp, workers were charged $35.00

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(4) from his conviction for holding Craig Connors to involuntary servitude.

per week for their meals, and additional sums of $1.00 for a pack of cigarettes, $3.00 for a pint of wine and $1.25 - $1.50 for beer. These costs were deducted from their wages and although the laborers were supposed to be paid every two weeks, the evidence was that they only received $5.00 each on payday.

The evidence also showed that workers were guarded at night and any who tried to flee were picked up and returned by Harris or others. There was proof of actual and threatened physical violence to prevent workers from leaving or to force them to work faster. A house, called the "jail", was used to confine workers who had tried to run away or for other punishment. Harris and Dennis Warren each carried a piece of rubber hose and beat laborers with them. Workers who complained of illness or injuries were denied medical assistance.

On September 13, 1981, Robert Anderson, a migrant worker from Philadelphia, died in a bus to which he had been taken after collapsing in the fields. Two autopsies established that the primary cause of death was heat stroke. His death and reports of civil rights violations at the farm precipitated an investigation of conditions at the camp by the FBI which ultimately ripened into these prosecutions.

We will describe other facts in the context of the contentions to which they relate.

II.

Effective Assistance of Counsel

Defendants Dennis and Richard Warren were represented by an attorney who was a member of the law firm which also was counsel for Cecil Williams, who, together with his son, was not charged with any crime but had employed Dennis Warren. After defendants' indictment, the government filed a motion to request a Garcia hearing,[5] in order to inquire into a possible conflict of interest on the part of the defense lawyer. The motion alleged the fact that the lawyer was a member of the law firm which represented Cecil Williams,[6] and the government requested a hearing to determine if the Warrens had knowingly waived their right

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[5] Named after United States v. Garcia, 517 F.2d. 272 (5 Cir. 1975), this hearing would advise the defendants of their right to independent counsel. Appropriate procedures are now set forth in F.R.Cr.P. 44(c).

[6] It asserted further that Williams was a potential prosecution witness at the trial. In fact he did testify for the government when the case was tried.

to independent counsel.[7] Unfortunately, due to a mechanical failure, no transcript was made of that hearing, nor was any written order entered. An agreed statement prepared by counsel to this appeal indicates that the Magistrate who decided the motion does not remember any separate inquiry into this possible conflict. Further, although the prosecuter recalls that the Magistrate found no need for independent counsel, defense counsel does not recollect whether this particular conflict was discussed or ruled upon. In any event, no change in representation occurred; the lawyer who was a member of the law firm representing Williams continued to represent the Warrens.

Defendants now contend that this conflict resulted in an adverse effect on the law firm's presentation of the Warrens' defense and hence violated their Sixth Amendment right to effective assistance of counsel.[8] First, the defendants claim that although counsel promised

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[7] The government's motion also requested inquiry into the joint representation of the two Warrens by the same firm.

[8] Although Harris did have independent counsel, he urges that because his trial counsel was assigned to the case at the last minute and took a back seat to the Warrens' attorneys that he, too, was denied effective assistance of counsel. In light of our conclusion that there was (continued)

during opening argument to place Williams on the stand to testify that he often spoke to the workers and heard no complaints, Williams was never called by the defense. Defendants argue that the law firm, nervous that Williams might implicate himself in the day-to-day running of the farm, instead refused to call Williams as a defense witness and devoted the cross-examination of Williams to an attempt to distance Williams from any interaction with the laborers. Defendants suggest that this "change of heart" might have been prompted by one heresay statement by a laborer, not admitted by the District Court, which alleged that Williams had ordered Harris to "kick some butt" to get the work done, and by several statements by workers that they were "afraid" to go to Williams to complain. Thus, defendants argue that they were deprived of their key witness, especially damaging after his testimony had been promised during opening argument. Second, defendants contend that the conflict deprived them of a possible "I was only following orders" defense, which they argue could have been asserted in mitigation of either culpability or punishment.

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(8) neither actual conflict nor adverse effect on the defense for the Warrens, we need not reach this issue.

The applicable legal standard, as set forth in Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), is that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." On the basis of the record as presently developed, we find neither actual conflict nor adverse effect.

First, the evidence adduced at trial simply did not indicate that Williams faced a significant risk of becoming implicated in the criminal conduct. The statements by laborers that they were afraid to go to Williams actually indicated that they were afraid that, if they complained to Williams and the defendants found out, the defendants would hurt them. Moreover, there simply is no evidence in the record (other than that one inadmissible statement) to indicate that Williams ever issued any orders or instructions to the defendants on how to manage the workers.[9] Therefore, we think that, on the present record, no actual conflict has been established.

Second, an examination of the record reveals that defense counsel did undertake vigorously to cross-examine Williams when he testified as a govern-

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[9] We note that Williams never invoked his Fifth Amendment right not to incriminate himself.

ment witness as to his dealings with the laborers, and that it was actually the district court that limited this cross-examination, ruling that such questions would have to be put to Williams when later called by the defense. Further, it appears that the decision not to call Williams for the defense was part of a purposeful defense strategy, forcefully urged in closing argument, that the government had not made out its affirmative case.[10] Thus, we conclude that, on

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[10] The strategy was partly successful. Harris and Dennis Warren were both acquitted on one count of holding a laborer to involuntary servitude and another count was dismissed before the case went to the jury.

Moreover, it is clear that defendants could not assert as a defense to their criminal liability that they were only following orders; such a defense may at most be submitted in mitigation of punishment. See McNamara v. Johnston, 522 F.2d. 1157, 1165 (7 Cir. 1975), cert. denied, 425 U.S. 9-1 (1976). In the present case, it cannot be said that defense counsel's decision to choose the defense that the government had not made out its case, rather than assert an "I was only following orders" defense in mitigation of punishment, shows that counsel's performance was other than deliberate, objective strategy unaffected by any adverse interest of Williams.

the present record, no showing has been made that defense counsel's performance was adversely affected. Defendants' Sixth Amendment claim must therefore be rejected.[11]

III.

The §§2 and 1584 Convictions

A. Holding Craig Connors to Involuntary Servitude

Although both Harris and Dennis Warren were convicted of holding laborer Criag Connors to involuntary servitude under 18 U.S.C. §§2 and 1584, only Harris has appealed his conviction. He challenges the legal sufficiency of the evidence to convict him.

While we have never considered the question of what conduct amounts to a holding for involuntary servitude under §1584, we recently dealt with the definition of "involuntary servitude" under 18 U.S.C. §1583. In United States v. Booker, 655 F.2d. 562, 566-567 (4 Cir. 1981), we affirmed a conviction

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[11] We do not, however, foreclose the possibility that the defendants may be able, by filing a motion under 28 U.S.C. §2255, further to develop the record and thereby establish that requisite actual conflict and adverse affect.

under §1583, for kidnapping with intent to hold the person to involuntary servitude, in the context of a migrant labor camp, noting that "the statute must be read not only to render criminal the evil Congress sought to eradicate so long ago, but, as well, its Twentieth Century counterpart." Finding that the defendant had contributed to "the climate of fear pervading Booker's camp created by the beatings and assaults on the workers and threats of like treatment" and to the "threat of violence or confinement, backed sufficiently by deeds," and noting that the availability of escape does not preclude a finding of involuntary servitude, we found that statute satisfied. See also United States v. Bibbs, 564 F.2d. 1165 (5 Cir. 1977)(beatings and threats of bodily harm), cert. denied, 435 U.S. 1007 (1978). However, it is clear that a mere reminder by the employer that the consequences of leaving will be exceedingly bad (e.g., deportation) is not enough. See United States v. Shackney, 333 F.2d. 475 (2 Cir. 1964).

Harris contends that there was no evidence that he personally ever assaulted Connors or threatened him with harm. The evidence revealed that Connors voluntarily came to the farm and that, when he tried to leave, Dennis Warren ordered him, at gunpoint, to return. Harris, however, was not involved in this incident.

We believe, nonetheless, that sufficient other evidence was adduced to convict Harris under 18 U.S.C. §§2 and 1584. First, Connors testified that he saw Harris physically beat other workers, contributing to the reign of physical terror at the farm. Second, Connors stated that Harris had stood guard outside the laborers' door at night, in order to prevent them from leaving. The combination of that guarding, which constituted personal involvement, with the beating of other workers, which sufficed to make Harris an aider and abettor, see United States v. Booker, supra, 655 F.2d. at 566 n. 4, constituted sufficient evidence to support the conviction.

B. Holding Harvey Rutherford to Involuntary Servitude

Both Richard and Dennis Warren challenge the sufficiency of the evidence supporting their conviction for holding laborer Harvey Rutherford to involuntary servitude under 18 U.S.C. §§2 and 1584. We think that the evidence clearly was sufficient to support Dennis Warren's conviction. When Rutherford spoke to another worker about leaving, Dennis told him that, if he left, he could get hurt because Dennis could do him bodily harm. Further, Rutherford testified that he heard Dennis Warren threaten to shoot Connors and that he had seen Dennis Warren with a gun in the front seat of his car. We believe that this was sufficient to support the conviction, as Dennis Warren both

aided and abetted Harris and personally threatened Rutherford. Although Rutherford did tell FBI agents who visited the farm that he was not being mistreated and felt free to leave, he escaped that very evening, went into town, and telephoned the FBI to tell them what the conditions were "really like".

Although somewhat weaker than the evidence adduced against Dennis Warren, we also conclude that the evidence was sufficient to support Richard Warren's conviction as an aider and abettor of Harris and Dennis Warren on this count. The evidence showed that Richard fraudulently induced Rutherford to go to the labor camp. Although apparently unknown to Rutherford, Richard Warren was identified by other witnesses as one who guarded the workers at night and patrolled the road to prevent their leaving. Rutherford, although he did not identify Richard as one of his guards, knew that he was not free to leave. In addition, Richard Warren said "[t]hat's right" when Dennis Warren, in response to Rutherford's comment about leaving, told Rutherford that he, Dennis, could do Rutherford bodily harm.

IV.

The §241 Convictions of Harris and Dennis Warren

Harris and Dennis Warren were convicted of conspiring to injure, oppress,

threaten and intimidate at least six laborers (who were United States citizens) in the exercise and enjoyment of their federal right to be free from involuntary servitude and slavery, resulting in the death of one, Robert Anderson. 18 U.S.C. §241. Their argument on appeal is that the death of Robert Anderson was outside the forseeable scope of the conspiracy, and therefore does not fall within the "if death results" punishment-enhancing clause of §241.[12] This clause permits the punishment to exceed the ten-year limit; Harris was sentenced to life imprisonment and Dennis Warren to twenty years' imprisonment.

The parties agree that under United States v. Guillette, 547 F.2d. 743, 748-50 (2 Cir. 1976), cert. denied, 434 U.S. 839 (1977) and United States v. Hayes, 589 F.2d. 811, 820-22 (5 Cir.), cert. denied, 444 U.S. 847 (1979)(identical language under 18 U.S.C. §242), the phrase "if death results" requires only that the "death ensued as a proximate result of the accuseds' willful violation of a victim's defined rights," 589 F.2d. at 820, rather than the death be the direct and intended result of the violation. Thus, where death forseeably and naturally results from the rights-

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12 See supra note 1.

violating conduct,[13] the statutory requirement for enhanced punishment is met.

The evidence indicates that Robert Anderson was already ill when he arrived as a migrant laborer at the camp; indeed it appears that he actually was wearing a hospital identification band on his wrist. On the day before he died--only two days after arriving--Anderson was in the field picking potatoes very slowly, obviously weak, but each time he stopped and sat down, Harris would come over and tell him to get up and get back to work. Further, when Anderson then went to sit in the shade, Harris went and brought him back to the field to work. Later that night, Anderson, part of a work crew, began vomiting blood, and Dennis Warren was told about this. The next day, Anderson would not get up for work, telling Harris that he was sick, but Dennis Warren grabbed Anderson and forced him onto the bus for work. On the bus--which Harris and Dennis Warren were aboard--Anderson was again vomiting. Out in the field, where it was extremely hot, Anderson sat down, but Harris hit him with a stick and ordered him back to work. Harris refused a request by Anderson for a doctor and medicine, again ordering him to work. Anderson

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[13] Therefore, the conduct must be such as to create an unacceptable risk of loss of life. Hayes. 589 F.2d. at 821.

soon thereafter collapsed in the field, and was carried back to the bus by some other workers. By the time that the county rescue squad arrived, Anderson was dead, The medical experts gave the likely cause of death as heat stroke, although one doctor indicated that alcohol withdrawal was a less-likely alternative.

Viewed in the light most favorable to the government, we think that this evidence clearly suffices to support the jury's conclusion that Anderson's death was proximately caused by defendants' unlawful conduct. Knowing Anderson was very ill, defendants physically forced him to continue working, performing hard labor in a potato field. We think that, under these circumstances, death was a foreseeable and natural result of the holding of Anderson to involuntary servitude, and we therefore find that the "if death results" requirement was amply provided by the evidence adduced at trial.

We also reject defendants' contention that the district court improperly admitted the only evidence showing, as required under §241, that Anderson was a United States citizen. There was, indeed, no identification on the person of the deceased, and his identity and citizenship were established by matching his fingerprints to those on an FBI file card. The state medical examiner who took the fingerprints from the deceased identified the fingerprint card used by the

FBI as the card that he had made from the deceased. The FBI fingerprint expert testified that this card had matched a card in the FBI files, which gave the name Robert Lee Anderson, born in Philadelphia on March 4, 1941. The chain of custody of the fingerprints was therefore complete, and United States citizenship was established. In addition, the government also intorduced the birth certificate of Robert Lee Anderson, born in Philadelphia on March 4, 1941, corresponding to the information contained on the FBI file card. Thus, the requisite showing of the citizenship of the deceased was made.

V.

The Trial Court's Dismissal of Richard Warren's §241 Conviction

The indictment charged all three defendants as co-conspirators in a single conspiracy to oppress at least six laborers in the enjoyment of their federal right to be free from involuntary servitude, which conspiracy resulted in the death of laborer Robert Anderson. 18 U.S.C. §241. The district court instructed the jury that if it found the defendants not guilty of a conspiracy resulting in death, it could then find as a lesser included offense guilt of a conspiracy not proximately resulting in death. The jury found both Harris and

Dennis Warren guilty of conspiracy resulting in death. However, the jury acquitted Richard Warren of a conspiracy resulting in death but convicted him of a conspiracy not resulting in death.

In response to post-trial motions from the three defendants, the district court upheld the convictions of Harris and Dennis Warren, but entered a judgment of acquittal as to Richard Warren on the conspiracy charge. It correctly noted that only one conspiracy had been charged and proven at trial, and that under the law of conspiracy all co-conspirators are equally responsible for the acts of others done in furtherance of the conspiracy. United States v. Snead, 527 F.2d. 590, 591 (4 Cir. 1975)(per curiam). Therefore, the district court concluded that the verdicts were logically inconsistent, for either the conspiracy proximately resulted in Anderson's death or it did not. The court then reasoned that because the inconsistency was within a single count of the indictment, it had to be resolved despite the general rule that inconsistent verdicts are permissible. Looking for the least intrusive and most equitable remedy, the court granted Richard Warren a judgment of acquittal on the conspiracy count, reaffirming the convictions of Harris and Dennis Warren. It is, of course, the government's appeal which raises the correctness of this ruling.

The starting point for our inquiry is Dunn v. United States, 284 U.S. 390

(1932), where the defendant had been charged in a three-count indictment with maintaining a common nuisance by keeping for sale intoxicating liquor, unlawful possession of intoxicating liquor, and unlawful sale of such liquor. The evidence--that defendant sold liquor to prohibition agents--was the same for all counts, but the jury acquitted as to counts two and three, convicting only as to the nuisance count. The Supreme Court affirmed the conviction, holding that:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment, the same rule must hold. As was said in Steckler v. United States (C.C.A.2d.) 7 F.(2d.) 59, 60:
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> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction

> the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

284 U.S. at 393 (citations omitted).

The rule in Dunn was applied to inconsistencies between multiple defendants in United States v, Dotterweich, 320 U.S. 277 (1943). There, two indictments had charged a company and its president with violations of the Food, Drug, and Cosmetic Act. The jury acquitted the corporation on all charges, but convicted the president, Dotterweich, on all charges as an agent of the company. The Court rejected a claim that this constituted an impermissible inconsistency, holding

> "Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely

> increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries. Dunn v. United States....

320 U.S. at 279.

This court, also has recognized that a jury may exercise lenity in order "to prevent the punishment from getting too far out of line with the crime." United States v. Scheper, 520 F.2d. 1355, 1358 (4 Cir. 1975), quoting United States v. Maybury, 274 F.2d. 899, 902 (2 Cir. 1960).

We think that the verdict in the present case, while in conflict with the evidence and applicable legal rules of vicarious guilt, is a legally unassailable product of jury lenity. The evidence at trial showed that although Richard Warren was part of the conspiracy to deprive workers of their right to be free from involuntary servitude, he had no part in the events directly involving Anderson on the day before, and day of, his death. The verdict, convicting Richard Warren of the lesser included offense, therefore is explainable as the jury exercising leniency so as to avoid the legal rule that co-conspirators are equally responsible and equally punishable for the acts of their partners. Because jury lenity is the basis for the Dunn and Dotterweich rule

that inconsistent verdicts may stand, and because the jury's findings in the present case are readily attributable to such lenity,[14] we conclude that Richard Warren's conviction was not subject to reversal by the district court.

Nor can we agree that the result in the present case must be different because the three co-conspirators were charged, and the inconsistency occurred, within the same count of the indictment. This "rule", which Warren would derive from United States v. Fox, 433 F.2d. 1235, 1238 n. 21 (D.C. Cir. 1970) (dictum), actually is nothing more than the rationale from Dunn that inconsistent verdicts may stand if they could

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[14] Where as here the jury's inconsistent findings are explainable as an exercise of lenity, that explanation--rather than confusion or vindictiveness resulting in heightened punishment on the other count or of the other defendant--will be credited. Dunn, 284 U.S. at 393-94. Therefore, cases such as Marquez-Anaya v. United States, 319 F.2d. 610 (5 Cir. 1963), and Fuller v. United States 407 F.2d. 1199, 1223-25 (D.C. Cir. 1968)(en banc), cert. denied, 393 U.S. 1120 (1969), in which the defendants were convicted on both of two inconsistent counts, are not relevant here, for they cannot be explained by jury lenity.

have been separately charged and tried.[15] Although the indictment did charge the three defendants together within the same count, it is clear that they could have been separately charged and tried. In Standefer v. United States, 447 U.S. 10, 21-25 (1980), the Supreme Court held that nonmutual collateral estoppel may not be applied against the government from one criminal case to another criminal case involving a different defendant.[16] Central to this holding was a recognition that juries may return inconsistent verdicts based on compassion or the exercise of lenity. Id. at 22. Given that the defendants here could have been indicted and tried separately, without res judicata or collateral estoppel effect against the government, we conclude that the Dunn rationale is applicable to this case, and that the inconsistent verdicts must stand.[17]

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15 Indeed, the only case cited by Fox was Gillars v. United States, 182 F.2d. 962, 966-67 (D.C. Cir. 1950), and that case merely quoted Dunn's holding that each count in an indictment is to be regarded as a separate indictment.

16 In Standefer, the Court affirmed the conviction of an aider and abettor under 18 U.S.C. §2, even though the "principal" had already been acquitted.

17 We further note, in passing, that the remedy ordered by the district court would (continued)

VI.

Summary

To summarize our holdings: We reject defendants' claims that they were denied their Sixth Amendment right to effective assistance of counsel. Defendant Harris' convictions under 18 U.S.C. §241 and 18 U.S.C. §2 and 1584 are affirmed. Defendant Dennis Warren's convictions under 18 U.S.C. §241 and 18 U.S.C. §§2 and 1584 are affirmed. Defendant Richard Warren's conviction under 18 U.S.C. §§2 and 1584 is affirmed, but the judgment of acquittal entered by the district court as to the 18 U.S.C. §241 count is reversed.[18]

Nos. 82-5049, 82-5052 and 82-5157
AFFIRMED;
No. 82-5181 REVERSED.

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(17) not be appropriate if the inconsistency were not attributable to leniency, but instead was laid to jury confusion. Although the district court inferred that the jury first found Harris and Dennis Warren guilty of conspiracy proximately resulting in death and then became confused as to Richard Warren, it is logically equally possible that the jury first decided that the conspiracy, of which Richard Warren was a member, did not proximately result in death, and then became confused when it considered the roles played by Harris and Dennis Warren in the death. There would be no better logical reason, therefore, for entering a judgment of acquittal for Richard (continued)

(17) Warren, as was done, than for entering judgments of guilt only as to the less included offense for Harris and Dennis Warren, bringing them into line with Richard Warren. However, because here the inconsistency is attributable to jury leniency and the inconsistent verdicts must therefore stand, we need not resolve the problem of what would have constituted proper relief.

18 As a result of our rulings, the district court's original Judgment and Probation/Commitment Order, filed Feburary 2, 1982, is reinstated.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
DENNIS WARREN, JOHN LESTER HARRIS, RICHARD WARREN and HALSEY NORWOOD, a/k/a JOSE WOODRUFF.	)	ORDER

Defendants, Dennis Warren, Richard Warren, and John Lester Harris, were indicted by a federal grand jury on one count of conspiracy to violate the civil rights of various individuals, which conspiracy resulted in the death of Robert Anderson; on four counts of holding certain persons to involuntary servitude; and on one count of kidnapping and carrying away an individual with the intention of holding him as a slave.[1] See 18 U.S.C. §§241, 1583, 1584 and 2 (1976).

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[1] Count one of the indictment charged Dennis Warren, Richard Warren and John Lester Harris with conspiracy to violate civil rights resulting in the death of Robert Anderson. Counts two and four charged Dennis Warren with willfully holding certain persons to involuntary servitude. Count five charged all three defendants with holding Harvey Rutherford to (continued)

Defendants were tried by a jury in Raleigh, North Carolina. Defendants, Dennis Warren and John Lester Harris, were convicted of conspiring to violate the civil rights of certain individuals, which conspiracy resulted in the death of Robert Anderson. Richard Warren, on the other hand, was found not guilty of the conspiracy resulting in death but was found guilty of conspiring to violate certain persons' civil rights.[2] The jury also convicted Dennis Warren on two substantive counts, Richard Warren on one substantive count, and John Lester Harris on three substantive counts.

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(1) involuntary servitude. Count Six charged Harris with kidnapping Joseph Simes with the intent to hold him as a slave. Count three was dismissed at the close of all the evidence.

2 The statute provides, in pertinent part, that:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same;

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(continued)

Sentencing was held before the undersigned United States District Court Judge, who presided at the trial, in New Bern, North Carolina. Harris received a life sentence on the conspiracy count and five-year sentences on each of three substantive counts, such sentences to run consecutively. Dennis Warren received a twenty-year sentence on the conspiracy count and five-year terms on each of two substantive counts, such sentences to run concurrently. Richard Warren received concurrent split sentences on both the conspiracy and substantive counts of imprisonment of six months and probation for five years. See 18 U.S.C. §3651.

The matter is before this court on motion of the defendants for judgments of acquittal, or, in the alternative, for new trials. Fed. R. Cr. P. 29, 33. The government and defendants have submitted briefs on these motions, and they are ready for ruling.

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(2) They shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. §241 (1976).

Motions Based on Insufficient Evidence

All defendants move the Court for judgments of acquittal or, in the alternative, for new trials on all counts based upon a lack of sufficient evidence to support the verdict. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is whether, after considering "the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The government produced substantial direct and circumstantial evidence at trial tending to prove the defendants' guilt of the offenses for which they were convicted. The Court remains firmly convinced that more than sufficient evidence existed to support the findings of the jury. The motions as to the conspiracy and substantive counts, based on insufficiency of the evidence, are denied.

Motion Based on Conviction for Count not Charged in Indictment

Defendant, Richard Warren, moves the Court for relief on the ground that he was convicted of a crime not charged in the indictment. Essentially, he asserts that the indictment charged a conspiracy to violate individuals' civil

rights which resulted in the death of an individual. 18 U.S.C. §241. The indictment did not charge, he claims, a conspiracy simply to violate civil rights. His argument is meritless.

The statute at issue proscribes conduct through which persons "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or law of the United States..." Id. In fixing the punishment for such conduct, the statute provides for a fine of "not more than $10,000 or imprisonment for not more than ten years, or both; and if death results...imprisonment for any term of years or for life." Id. (emphasis added). Thus, in fixing the punishment for this crime, Congress created a situation which gives rise to a lesser included offense.

An instruction on a lesser offense is proper "where some of the elements of the crime charged themselves constitute a lesser crime..." Sansone v. United States, 380 U.S. 343, 349 (1965), quoting Berra v. United States, 351 U.S. 131, 134 (1956). The offense charged in the indictment was a conspiracy with death resulting. Obviously, the conspiracy itself, even if the jury found that no death resulted from it, remains a crime proscribed by the statute.

Two requirements exist for a lesser included offense. First, all of the

elements of the lesser offense must be necessary to sustain a conviction of the greater offense. Second, the jury must be required to find a disputed factual element to sustain a conviction for the greater offense which is not required for the lesser offense. Id. at 350. Both criteria are satisfied here, since all elements of the conspiracy alone would necessarily be required to justify a conspiracy where death resulted. Likewise, the greater offense necessitates the jury's finding the factual element that death resulted to support a conviction for the greater offense, an element not required for conspiracy alone.

A defendant may be convicted of an offense necessarily included in the offense charged. Fed. R. Cr. P. 31(c). A conspiracy to violate civil rights is clearly included in a charge of such a conspiracy in which death resulted. The instruction to the jury concerning the lesser included offense was appropriate. Since Richard Warren was not convicted of an offense not charged in the indictment, his motion for judgment of acquittal or new trial on that ground is denied.

Motion Based on Inconsistency in Verdict

Finally, all defendants move for judgments of acquittal or new trials on the ground that the jury returned inconsistent verdicts on the conspiracy count.

Essentially, they argue that since the jury found Dennis Warren and Harris guilty of a conspiracy in which death resulted, while acquitting Richard Warren of that charge (but convicting him of the lesser included offense of the conspiracy), it found two conspiracies. Although this position may at first seem plausible, circumspection reveals its untenable character.

The indictment charged all three defendants with one, and only one, conspiracy. A conspiracy to violate various persons' civil rights, which conspiracy resulted in the death of Robert Anderson.[3] As noted previously, that charge necessarily included the lesser offense of a conspiracy to violate civil rights in which no death resulted. Evidence disclosed that a conspiracy occurred, and the jury found that the death of Robert Anderson resulted from that conspiracy as to Dennis Warren and Harris. Defendants' argument fails to establish that the evidence proved two conspiracies. Contra Kotteakos v. United States, 328 U.S. 750 (1946) [indictment charged one conspiracy but evidence established eight or more unconnected and distinct conspiracies] .

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[3] Perhaps the government, had it chosen to do so, could have indicted the defendants together in separate counts for conspiracies to violate the civil rights of each of the victims (Robert Anderson, Craig Connors, Gordon Lambert, Alvin Rhodes, Harvey Rutherford and Joseph (continued)

An independent review of the evidence reveals proof of but one conspiracy. Given the absence of any variance between the conspiracy charged in the indictment and that proved at trial, no merit arises from defendants' claim of inconsistency as to Dennis Warren and Harris. Their motion on this ground is denied.

Defendants advance a corollary proposition: that the inconsistency among the verdicts as to the conspiracy charge renders all verdicts on that count infirm. Going beyond a claim of variance, this argument focuses on the idea that if only one conspiracy occurred, all members of it were equally responsible. The divergent verdicts on the conspiracy charge, therefore, suggested different degrees of culpability. Because of the novel situation presented by this case, a detailed explanation is appropriate.

The conspiracy statute involved herein provides for possible increased punishment if the trier of fact finds that death resulted from the conspiracy. Accordingly, the Court instructed the jury regarding the lesser included offense.[4]

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(3) Simes) with only one count having resulted in a death, to-wit, that involving Robert Anderson. Such speculation is beyond the scope of this inquiry.

4 The Court instructed the jury as follows:
(continued)

While this instruction properly covers a situation involving a lesser included substantive offense, it allowed the jury to consider impermissibly the defendant Richard Warren's culpability as to a lesser included conspiracy. After having acquitted him of the conspiracy resulting in death, the jury deliberated on the issue of his involvement in the same conspiracy but without death resulting. Had the jury found that the conspiracy charged in the indictment did not result in the death of Robert Anderson, then it could properly have found any one--or all--of

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(4) However, if you find the defendant not guilty of the offense as charged in count one of the bill of indictment, you will then consider whether he is guilty of the lesser included offense of conspiring to injure, oppress, threaten or intimidate a citizen in the free exercise of his constitutional right to be free from involuntary servitude and slavery.

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if the jury should unanimously (continued)

the defendants guilty of the lesser included offense.[5] A brief capsule of the law regarding conspiracies more clearly illustrates the error of this development.

Every member of a conspiracy is responsible for the acts of others done in furtherance of the conspiracy. United States v. Martino, 648 F.2d. 367, 394 (5th Cir. 1981), petition for cert. filed 50 U.S.L.W. 3423 (U.S. Nov. 13, 1981) (No. 81-907); United States v. Snead, 527 F.2d. 590, 591 (4th Cir. 1975) (per curiam). Since only one conspiracy was, in fact, charged, all members of that conspiracy were responsible for its results. Hence, if, as to some co-conspirators, the conspiracy resulted in death, it must have resulted in death, ipso facto, as to all co-conspirators.

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(4)

> find the defendant "not guilty" of the crime charged in count one of the indictment, then the jury must proceed to determine the guilt or innocence of the defendant as to any lesser offense which is necessarily included in the crime charged in count one.
>
> Count one includes the lesser offense of a conspiracy in violation of Title 18 United States Code §241.
>
> The elements necessary for a conviction under this lesser included offense are exactly the same as for the offense as charged in count one except that the element of a resulting death is eliminated.

Under the Court's instructions, the jury initially considered whether each defendant participated in a conspiracy which resulted in the death of Robert Anderson. As to Dennis Warren and Harris, the jury answered this question in the affirmative, as evidenced by the verdicts of guilty. Conversely, the jury found Richard Warren "not guilty" of this charge.

The problem arises, however, with the verdict rendered as to the lesser included offense. Logically, once the jury found a conspiracy resulted in death, there was no lesser included offense to consider.[6] The jury should never have considered the lesser included offense,

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[5] In its charge, the Court did not consider the possibility of a verdict of "guilty" on the indictment as charged as to some--but not all--of the defendants vis-a-vis the lesser included offense as to those found not guilty of the offense as charged.

[6] At the risk of oversimplification, only one conspiracy exists under the statute. See 18 U.S.C. §241, supra n.2. Thus, that single conspiracy either did or did not result in the death of Robert Anderson. Whichever was the case, it was so for any and all members of the conspiracy. The jury should have been instructed to determine three things: (1) was there a conspiracy; (2) if so, who became members of the conspiracy; and (3) did the conspiracy result in the death of Robert Anderson?

once it determined that a conspiracy existed which resulted in death. With this logical inconsistency apparent on the face of the verdict, the Court now faces the prospect of solving the puzzle within the context of its inherent post-trial authority.

The government suggests that no problem exists, relying on the well-settled principle that consistency in a verdict is not required. Dunn v. United States, 284 U.S. 390, 393 (1932). This simple explanation is insufficient in the instant action. Although a jury may properly render verdicts on some, but not all, counts of an indictment, see Hamling v. United States, 418 U.S. 87, 91-92, 100-101 (1974), the problem is more acute involving logical inconsistency within a particular count of the indictment. "What is required is consistency within individual counts and an ample evidentiary base for conviction."[7] United States v. Fox, 433 F.2d. 1235, 1238 n.21 (D.C. Cir. 1970)(emphasis added). See Gillars v. United States, 982 F.2d. 962, 966-67 (D.C. Cir. 1950). A much different situation

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7 The government cites cases from all of the circuit courts of appeals. While all stand for the proposition that inconsistent verdicts are permissible, a factual analysis reveals distinctions in each case. The cases fall into two categories, either the inconsistency is among (continued)

arises with apparent inconsistencies among different counts. See United States v. Flowers, 255 F.Supp. 485 (E.D.N.C. 1966). There the Court stated that:

> it is settled beyond cavil in the [f]ederal courts that verdicts on different counts of a single indictment returned by the same jury at the same time are valid even though they may be logically inconsistent. Though a conviction on one count may be inconsistent with acquittal on another, the verdict will be allowed to stand.

Id. at 487. The crucial factor becomes whether the inconsistency lies within a single count. Simply stated, a jury may render verdicts on different theories "so long as the offenses are not in conflict". Fuller v. United States, 407 F.2d. 1199, 1225 (D.C. Cir. 1968)(en banc), cert. denied, 333 U.S. 1120 (1969).

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(7)different counts, see e.g. United States v. Walker, 653 F.2d. 1343, 1351 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3570 (Jan. 18, 1982); United States v. Uzzolino, 651 F.2d. 207, 212-14 (3d Cir.), cert. denied, 50 U.S.L.W. 3249 (Nov. 5, 1981); United States v. Privette, 648 F.2d. 73, 80-81 (1st Cir. 1981); Arnold v. Wyrick, 646 F.2d. 1225, 1228 (8th Cir. 1981); United States v. Jacobs, 632 F.2d. 695, 697 (7th Cir. 1980); United (continued)

As applied to the instant situation, the offenses are in conflict. Since the indictment charged and the evidence adduced at trial showed only one conspiracy, it either did or did not result in death--not both.[8]

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(7) States v. Berardi, 629 F.2d. 723, 729 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Dennett, 551 F.2d. 261, 263 (10th Cir. 1977); United States v. Scheper, 520 F.2d. 1355, 1358 (4th Cir. 1975); United States v. Fox, 433 F.2d. 1235, 1238 (D.C. Cir. 1970), or it involved the conviction of one co-conspirator and the acquittal of another. See, e.g., United States v. Cargo Service Stations, Inc., 657 F.2d. 676, 685 (5th Cir. 1981); United States v. Sandy, 605 F.2d. 210, 215-16 (6th Cir.), cert. denied, 444 U.S. 984 (1979). None of these cases address the essential question posed herein, dealing with logical and legal inconsistency among verdicts as to the same count of an indictment.

8 An analogous situation developed when a jury convicted a defendant of both smuggling marijuana into the United States and failing to pay a transfer tax on the same marijuana. In the former act, the marijuana must start outside the United States, while in the latter it must start at some point in the United States. Since the evidence disclosed an "uninterrupted movement into the United States of a single quantity of marijuana," convictions on both counts (continued)

The present situation displays that "rare case" where the "verdicts demonstrate that there was no legal basis for a jury's decision." United States v. Uzzolino, 651 F.2d. 207, 213 (3d Cir.), cert. denied, 50 U.S.L.W. 3249 (Nov. 5, 1981). Upon a review of the instructions to the jury with an eye to the practicalities of the facts produced at trial, see Sealfon v. United States, 333 U.S. 575, 579 (1948), the inescapable conclusion emanates that the jury absolved Richard Warren of responsibility in the conspiracy which resulted in the death of Robert Anderson. Just as clearly, the jury found Dennis Warren and Harris participated in that conspiracy. After making these determinations, the jury impermissibly, through no fault of their own, proceeded to consider the lesser included offense as to Richard Warren. Attention now turns to ascertaining a remedy which rectifies that unwarranted deliberation.

Recognizing that an error at law appears on the face of the verdict, the Court desires to correct the error in the least intrusive manner. Defendants, Dennis Warren and Harris, demonstrate no prejudice to them evolving from the inconsistency among the verdicts on the conspiracy count. Indeed, they have suffered no prejudice. The jury, under proper instructions regarding a conspiracy

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(8) could not stand. Marquez-Anaya v. United States, 319 F.2d. 610, 611-12 (5th Cir. 1963).

to violate civil rights resulting in death, convicted both of them. Those convictions are proper, and they must stand.

The plight of Richard Warren creates some difficulty. Since the jury has acquitted him of the conspiracy resulting in death, a new trial poses no acceptable solution. At such a trial, he could only be prosecuted for the conspiracy alone.[9] If convicted, the serious and perplexing question of inconsistent verdicts would remain, certainly in spirit if not in fact.

The most equitable remedy, given the totality of the facts and circumstances appearing herein, is to grant Richard Warren a judgment of acquittal. See Fed. R. Cr. P. 29(c). His motion for that relief as to count one is allowed. The appellate courts remain free to reinstate the conviction should further analysis make such judgment appropriate. United States v. Wilson, 420 U.S. 332, 352 (1975).

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[9] Double jeopardy principles bar reprosecution of Richard Warren for conspiracy resulting in death after his acquittal on that charge. U.S. Const. amend. V.

CONCLUSION

The fact-finding authority remains the sole province of the jury. Only in circumstance of evidentiary insufficiency or legal impossibility should the courts tred on this hallowed ground. Ever mindful of Justice Holmes' recognition that "the jury has the power to bring in a verdict in the teeth of both law and facts," Horning v. District of Columbia, 254 U.S. 135, 138 (1920), the decision to invade that province today is, although prompted by legal necessity, undertaken reluctantly. Often the most steadfastly held principles must yield to what is just.

Therefore, the motion of Richard Warren for a judgment of acquittal as to the conspiracy count is allowed. All other motions involving any or all of the three defendants are denied.

SO ORDERED.

This 24th day of March, 1982.

/s/ W. Earl Britt
United States District Judge